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Chairman: Mr. Zyman (Vice-Chairman) ..... (Poland)
later: Mr. Yañez-Barnuevo (Chairman) ..... (Spain)

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In the absence of Mr. Yañez-Barnuevo (Spain), Mr. Zyman (Poland), Vice-Chairman, took the Chair.

The meeting was called to order at 9.35 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Lavalle-Valdés** (Guatemala) said that the reference in article 4, paragraph 2 (a), of the draft articles on the effects of armed conflicts on treaties, to provisions of the Vienna Convention on the Law of Treaties gave the impression that the "intention" referred to in the draft article related to the interpretation of the treaty. That would be the case where the treaty expressly or implicitly indicated the intention of the parties concerning the termination or suspension of the treaty in the event of an armed conflict. Generally speaking, however, treaties contained no reference, even implicitly, to such an eventuality. Surely, in such cases, the very attempt to ascertain the effects of the armed conflict on the treaty amounted to an interpretation of the treaty. Thus, if the object of the treaty was the sale of ships, for example and the treaty, while indicating the price, made no reference to delivery or payment methods, any resort to the travaux préparatoires or the circumstances of the conclusion of the treaty in order to resolve such issues, was tantamount to an interpretation of the treaty, using the means laid down by the Vienna Convention.

2. By contrast, where there was agreement on all the elements essential to the operation of the treaty, but the parties wished to determine the status of an additional feature which related to the treaty but did not constitute an essential element, any action taken to determine such a feature did not constitute interpretation. Thus, to revert to the example of a treaty under which one State sold ships to another, it might be necessary to establish whether the parties had agreed that, in the event of a ship sinking after its delivery by the first State, the vendor was obliged to replace the lost ship by another at the same price and on other previously agreed conditions. In that case, the action taken to ascertain whether there had been such an agreement between the parties was in no sense an interpretation of the treaty, since all that needed to be established was whether an additional agreement had been made or not.

3. Similarly, in the case of a treaty which, as usually happened, contained no provision concerning the question of whether it would operate or not in the event of an armed conflict between the parties, the action that needed to be taken to ascertain whether there had been an agreement in that regard between the parties again could not be considered interpretation of the treaty, whether or not the travaux préparatoires of the treaty were consulted.

4. He therefore proposed that, in the interests of giving draft article 4 more clarity and force, the existing text should be replaced by provisions worded along the following lines:

> "1. Where a treaty indicates the intention of the parties relating to the termination or suspension of the treaty in case of an armed conflict, or where such intention may be deduced from the interpretation of the treaty, that intention shall stand.
>
> 2. In any other case, the intention of the parties to a treaty with regard to its termination or suspension in case of an armed conflict shall, in the event of disagreement between the parties in that regard, be determined by any reasonable means, which may include the travaux préparatoires of the treaty or the circumstances of its conclusion.
>
> 3. The foregoing shall be without prejudice to any decision that the parties may, by mutual agreement and without a breach of *jus cogens*, make at any time."

5. **Ms. Woollett** (Australia) said that the draft articles on the effects of armed conflicts on treaties represented a useful basis on which to begin the debate on the topic. Her delegation strongly agreed with the Special Rapporteur's suggestion that the Commission should not attempt to embark on a comprehensive definition of armed conflict in draft article 2. It also agreed that a possible solution might be to adopt a simpler formulation, stating that the articles applied to armed conflicts, whether or not there had been a declaration of war.

6. Her delegation shared the concerns expressed by other States about draft article 4. Since, when negotiating treaties, States did not usually consider the effect that going to war might have on a given treaty, their intention in that regard might be absent or difficult to prove. The question of intention — and other possible criteria — should be examined further.

In particular, it would be important to ensure that any criteria on termination or suspension set out in the draft articles conformed to the Vienna Convention on the Law of Treaties.

7. Draft article 7 would prove highly controversial, given its attempt to outline the categories of treaty that were likely to remain in force during armed conflicts. She noted that the list was intended to be indicative rather than exclusive in nature.

8. Her delegation welcomed the decision to include the topic "The obligation to extradite or prosecute (aut dedere aut judicare)" in the Commission's programme of work. The principle was of critical importance in ensuring effective action against criminal acts, as highlighted in the Committee's recent work on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel and the draft comprehensive convention on international terrorism.

9. Her delegation would welcome final reports by the end of the quinquennium on several topics, especially the draft articles and commentary on diplomatic protection. It hoped that the second reading of the draft articles would be completed during the fifty-eighth session of the Commission and submitted to the General Assembly in 2006.

10. **Mr. Al-Jadey** (Libyan Arab Jamahiriya), referring to the topic "Shared natural resources", stressed the importance of making explicit reference in the draft articles to General Assembly resolution 1803 (XVII) concerning permanent sovereignty over natural resources. The Commission's work on groundwater should avoid ambiguity, particularly as the draft articles drew heavily on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which thus far had failed to win full international acceptance. Bilateral and regional arrangements played an important role and with regard to groundwaters the term "arrangements" as contained in draft article 3, should be construed as meaning an optional course of action which States pursued of their own volition.

11. The draft articles on the responsibility of international organizations, were satisfactory, particularly draft article 1, which did not confine itself to enumerating internationally wrongful acts on the basis of the principle of *nullem crimen, nulla poena sine lege*, but offered greater flexibility in addressing conduct by organizations of which the international organization that incurred responsibility was a member. With regard to the Commission's request for comments on specific issues relating to the topic (A/60/10, para. 26), it would be desirable to include in the draft articles provisions on the responsibility of international organizations for decisions taken on the basis of direction, control or coercion.

12. With regard to the topic "Diplomatic protection", the purpose of such protection was to remedy any injury done to a national of the applicant State. The concept differed from that of diplomatic protection as a means of preventing injury. Agreement on that concept would help the Commission to avoid further confusion on the action to be taken by States wishing to protect their nationals. In that regard, the *Mavrommatis* principle should not be extended, since it would dilute the rule on the exhaustion of domestic remedies.

13. The draft articles adopted on first reading dealt only with the conditions for the exercise of diplomatic protection, but gave no guidance on important questions such as who could exercise such protection; how it should be exercised; and what its consequences were. Draft article 16, paragraphs (a), (b) and (c), negated draft articles 14 and 15, since the wording was very loose and open to wide interpretation. Since the purpose of the rule on the exhaustion of legal remedies was to spare States from having to defend themselves before an international body with respect to any acts attributed to them, whenever domestic remedies were available, the introduction of conditions and exceptions to that rule could be used to avoid complying with the rule itself. Draft article 17 should be interpreted as referring not to coercive measures such as the imposition of protection by means of force or the application of mandatory penalties or selective measures, but rather to actions or procedures regulated by bilateral, regional or international treaties.

14. Concerning the topic "Expulsion of aliens", the terms "alien" and "expulsion" must be defined more precisely. In particular, the draft articles should focus on the reasons for expulsion. The Special Rapporteur should review State practice and national legislation in order to elaborate an international instrument that would win universal support. The Commission's study on unilateral acts of States had encountered numerous difficulties, not least of which was the definition of the topic itself. There was also considerable confusion over the purpose of the study and much work was

needed to address the many contradictions which the study had brought to the fore.

15. Since unilateral acts were usually a means of achieving political ends, their legal effects did not necessarily reflect their true nature. The ambiguities inherent in certain types of unilateral act often made it difficult to distinguish between a political act and a legal act. The assumption that a unilateral act was the expression of the free will of a State was flawed, since the term "unilateral act" covered a wide range of legal relations. Furthermore, the term "conduct" encompassed both action and inaction: acquiescence for example, was regarded as an act. The fact that some unilateral acts could have binding legal effects for other parties added to the difficulty of examining them with a view to their codification. The study of unilateral acts should take account of the different forms such acts could take, as well as other forms of unilateral acts that States might reform in the future. It should also take account of the disjunction between the form and the substance of a unilateral act, since the form did not always faithfully reflect the substance.

16. **Mr. Makarewicz** (Poland) said that the quality of the Special Rapporteur's first report on the effects of armed conflicts on treaties (A/CN.4/552) and the extraordinary speed with which it had been prepared had given the Commission a very solid basis for its work on the topic. He also commended the memorandum prepared by the Secretariat (A/CN.4/550 and Corr.1), which constituted a factual and legal treasury for further work.

17. The value of the report was greatly enhanced by the formulation of draft articles. The fact that they were intentionally provisional — many being based on provisions adopted by the Institute of International Law in its resolution II of 1985 entitled "The effects of armed conflicts on treaties" — gave the Commission an opportunity to develop the topic further. Commendable though they were, it was too soon for the draft articles to be transmitted to the Drafting Committee.

18. Draft article 2 put forward a wider definition of "armed conflict" to include both international and non-international conflicts. In principle, that approach was acceptable, but, in practice, it might give rise to problems relating to the qualification of certain specific situations, which might or might not be covered by the draft articles. Draft article 3 likewise posed a problem with its categorical statement that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. The Special Rapporteur himself had recognized the problem and proposed to replace the term "ipso facto" with the word "necessarily". While endorsing the proposed modification, his delegation noted that, in certain situations, the outbreak of an armed conflict might indeed cause the termination or suspension of a treaty ipso facto (or, perhaps, per se), for example in the case of a bilateral political or military alliance treaty. It could surely not be said that the Molotov-Ribbentrop pact had not terminated on the outbreak of war between Germany and the Soviet Union in 1941. Some additional elaboration was required to cover exceptional but possible situations.

19. Draft article 7 required further analysis. First, the Commission should check whether the catalogue of treaties continuing in operation during an armed conflict was complete and exhaustive. The memorandum by the Secretariat already contained suggestions for extending the catalogue. Moreover, such categories as "multilateral law-making treaties" should be made more specific. Perhaps, indeed, there was no need for the catalogue at all. Meanwhile, his delegation was pleased to note that the Special Rapporteur himself had acknowledged the need to give greater prominence to the possibility of separability of treaty provisions in the draft articles.

20. His delegation shared the Special Rapporteur's doubts as to whether it was necessary to introduce more detailed provisions concerning the legality or illegality of an armed conflict in connection with its effect on treaties. The Commission should consider the matter with particular care, bearing in mind the need to avoid, as far as possible, any politicization of its work. It should also avoid entering areas where other international bodies were primarily competent. The wording of draft article 10 therefore seemed the most appropriate. With regard to the scope of the draft articles, his delegation considered that extending it to cover treaties concluded with international intergovernmental organizations would be more ambitious and appropriate, although more complicated and difficult.

21. The work done on the topic "Fragmentation of international law", including the three reports considered at the fifty-seventh session and that considered at the fifty-sixth, meant that there was a

good chance that the Commission could finalize its work within the current quinquennium. The topic was undoubtedly a specific one. Being in the nature rather of research than of codification, it had been initially planned that the final result would take the form of a report or reports. There seemed, however, to be a movement in the Commission tending to the elaboration of general guidelines. His delegation endorsed that position.

22. **Mr. García Del Toro** (Cuba), referring to the preliminary report on the expulsion of aliens (A/CN.4/554), said that the term "expulsion of aliens" in its widest sense formed a suitable basis for the Commission's work. While it was a State's sovereign right not only to expel an alien whose presence was deemed undesirable or unacceptable, but also to refuse the admission of aliens to its territory, the expulsion process must be conducted in accordance with the procedures laid down by the law of the country in question and with international legal standards protecting the rights of such persons. The Special Rapporteur ought to examine all the legal consequences of expulsion in terms of the responsibility of the expelling State and the awarding of damages to persons who had been unlawfully expelled or expelled, in a manner contrary to international legal norms.

23. While "collective expulsions" were prohibited, it should be borne in mind, in the codification process, that bilateral agreements between States on the return of illegal immigrants should be regarded as legitimate sources of law. Consequently, the return of groups of aliens to their country of origin, from which they had unlawfully emigrated should, under no circumstances, be regarded as "collective expulsions". It was necessary to ensure that expellees did not remain in legal limbo because they were unable to find a territory in which they could settle. It might be possible to contemplate returning them to the country from which they had entered the territory of the expelling State. In many cases, such persons had spent a long time in a State other than that of their nationality, or had even become nationals of another State. They might have committed crimes, or be involved in situations with specific legal implications in that third State to which they should be answerable.

24. The tenth report on reservations to treaties (A/CN.4/558 and Add.1) demonstrated the breadth and depth of the Commission's work on that topic. Reservations to international treaties were an effective and necessary means of ensuring the universality of intentional treaties in a world which was increasingly interdependent, yet still full of political diversity and where national legal orders varied greatly. Reservations to treaties were a manifestation of the will of sovereign States and offered negotiating flexibility to States which sought to reconcile international legal thinking with their national legal systems. Calling into question the reservations regime established under the 1969 Vienna Convention on the Law of Treaties would result in placing excessively narrow limits on the admissibility of reservations, parties' freedom of consent and the supplementary nature of reservations which, in the final analysis, was determined by the will of States. Since the universality and balance of the Vienna regime was completely acceptable, there was no need to amend the pertinent provisions of the 1969, 1978 and 1986 Vienna Conventions.

25. The right to assess the compatibility of a reservation with the treaty in question, especially in the case of reservations prohibited by that treaty, belonged solely to the States parties and must not be given to the depositary. Such a transfer would constitute interference in the rights of the States parties. Nevertheless, the depositary played an essential role in the application of multilateral treaties inasmuch as it was obliged to discharge its duties in an impartial manner.

26. It would be useful to invite the human rights treaties bodies to the Commission's fifty-eighth session in order that the Commission might hear their views, even though it was not incumbent upon those bodies to pronounce upon the necessity of reservations. Their duty was to promote the acceptance and implementation of human rights instruments on the basis of the principle of free consent of the parties and of the parties' supervision of the work of those bodies.

27. With regard to the topic "Diplomatic protection", the Commission should move towards the adoption of a convention on diplomatic protection through the codification of norms which were accepted in practice, rather than through the progressive development of new norms which did not enjoy the wide approval of States. Diplomatic protection should continue to be a discretionary right of States and not an international obligation for them. It was primarily for a State to decide if it wished to take up the cause of one its nationals who claimed that he or she had suffered

injury as a result of an internationally wrongful act on the part of another State. Similarly, a State should seriously consider whether to grant diplomatic protection to its nationals in the event of the alleged existence of wrongful acts against them carried out by another State. States should evaluate the particular circumstances in which the acts had taken place, together with all aspects of the conduct of their nationals, before deciding to exercise protection or to embark on international litigation. It should also be stressed that diplomatic protection should be exercised solely by peaceful means in compliance with international law. Diplomatic protection involving the use of force was never permissible.

28. The Commission's future work on the formulation of exceptions to the principle that a State could not exercise diplomatic protection on behalf of one of its nationals unless the latter had exhausted domestic remedies should seek to prevent disparate interpretations leading to the improper application of that rule.

29. **Mr. Hmoud** (Jordan) said that producing a set of draft articles on the effects of armed conflicts on treaties was not a straightforward exercise consisting merely in the codification of long-standing rules of customary international law. On the contrary, it entailed the examination of the conflicting evidence of State practice and an endeavour to deduce what principles governing treaty relationships during exceptional circumstances were generally accepted by States.

30. In the modern world, with its system of multilateral relations, there was no longer any legal justification for derogations from the rule of law during an armed conflict. Treaty relations, even in such exceptional circumstances, should be governed by international law. Having established that principle, it was necessary to look at the various doctrines which conformed to it and then at all the relevant elements which had to be taken into consideration, including the nature and scope of the conflict, the content of treaty rules affected by the conflict and the intent of the parties to the treaty.

31. The topic was distinct from that of the legality of the use of force. If the rules of international law did not prohibit termination or suspension of a treaty, the exercise of that right should not be affected by the legality or otherwise of the use of force. If the draft articles created a link between the legality of the use of force and the right to suspend or terminate a treaty that would prejudge the issue of whether certain United Nations bodies were competent to rule on the application of treaties.

32. With regard to the draft articles themselves, in the context of draft article 1, it would be wise to examine the possibility of including within their scope treaties to which international organizations were parties. Such organizations were affected by the application of treaties in wartime and a State or the organization itself might incur responsibility as a result of the wrongful suspension or termination of certain treaty obligations.

33. Draft article 2 should contain a simplified working definition of the term "armed conflict" which did not, at the current stage, draw a distinction between international and non-international armed conflicts. The definition of an armed conflict should make no reference to the "nature or extent" of armed operations: that element should be an independent factor for determining whether treaties could be terminated or suspended if an armed conflict erupted.

34. Draft article 3 might prove useful if the determination, pursuant to article 4, whether a treaty was susceptible to termination or suspension in the event of an armed conflict was inconclusive. Article 3 would tend to keep the treaty in operation. The test of intention embodied in draft article 4 was important. Treaty obligations were contractual obligations and the intent underlying a contract had a bearing on the extent and manner of its operation. Moreover, the provisions of the Vienna Convention on the Law of Treaties regarding interpretation applied to the operation of a treaty as much in wartime as in peacetime. If the treaty's terms did not indicate that its drafters specifically intended the treaty to be susceptible to suspension or termination if a war started, the treaty was presumed to remain in operation in wartime. The nature and extent of an armed conflict had nothing to do with the intention of the drafters of a treaty. It would be worthwhile exploring the "nature" of the treaty in question, because it was an objective criterion facilitating the determination process. It might also be wise to re-examine the approach adopted in draft article 7. Lastly, draft article 11 might trigger controversy over whether the Security Council could order the termination or suspension of treaty obligations. It was to be hoped that the draft articles would not go into that matter.

35. **Ms. Dascalopoulou-Livada** (Greece) said that, although in many cases State practice in connection with the effects of armed conflicts on treaties dated back to the early 1950s, the Commission should make a thorough analysis of that practice and of the relevant jurisprudence. Her Government supported the general thrust of the draft articles, which would promote the continuity of treaty obligations in times of armed conflict when there was no genuine need for the suspension or termination of the treaty. Nevertheless it believed that the effect of an armed conflict on a treaty would very much depend on the specific provisions of that treaty, its nature and the circumstances in which it had been concluded. While the indicative list of treaties which would remain in operation throughout an armed conflict was useful, it required further elaboration. The Special Rapporteur had wisely placed the draft articles within the context of the Vienna Convention on the Law of Treaties, but a textual reference to particular articles of the Convention might not always be appropriate.

36. The criteria for defining the term "armed conflict" set out in draft article 2 were useful, although they might lend themselves to subjective interpretation. If there was to be a definition, it should include non-international armed conflicts, as they, too, could affect treaty relations. The draft articles should likewise cover military occupation (regardless of whether it was accompanied by protracted armed violence or armed operations) and territories placed under international administration. Article 5, paragraph 1, should indicate that the application of certain human rights and environmental law principles during an armed conflict was determined by the relevant *lex specialis*, namely the law designed to regulate the conduct of hostilities.

37. In draft article 4, the Special Rapporteur had made the intention of the parties to a treaty the main yardstick for ascertaining its susceptibility to termination or suspension. That criterion must, however, be interpreted in the light of other indicia in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties and of the nature and extent of the armed conflict. The Commission should carefully re-examine draft article 10 in view of the wish expressed by several of its members that the article take account of developments since the second World War with regard to the prohibition of the illegal use or threat of the use of force. The effects of aggression and self-defence on the operation of treaties deserved scrutiny in the light of article 75 of the Vienna Convention. The Commission should likewise reflect further on the text of the resolution of the Institute of International Law (A/CN.4/552, para. 123) which contained a number of provisions on that delicate issue.

38. The tenth report on reservations to treaties (A/CN.4/558 and Add.1) dealt with some core issues and contained many useful guidelines. The freedom to formulate a reservation, mentioned in draft guideline 3.1, was not absolute and its exercise was limited by the compatibility of the reservation with the object and purpose of the treaty. The presumption of freedom to formulate a reservation was different in substance from the presumption of the validity of a reservation. The definition of the term "specified reservations" proposed by the Special Rapporteur in draft guideline 3.1.2 was the best possible solution. Reservations formulated by virtue of a reservation clause which did not specify what reservations were permitted should be subject to the compatibility test. The Special Rapporteur's thorough analysis of the criterion of the compatibility of a reservation with the object and purpose of a treaty and its scope of application was most welcome. In addition, the method he had proposed in draft guideline 3.1.15 for determining that object and purpose was a good one.

39. The question of State practice when States did not oppose the entry into force of a treaty between themselves and the author of a reservation to which they had objected on the grounds that it was incompatible with the object and purpose of the treaty, was most pertinent. Objections to reservations incompatible with the object and purpose of a treaty did not have the same legal effects as objections to reservations which had successfully passed the compatibility test. An incompatible reservation would be null and void, irrespective of the reaction of other States parties. An objection to an incompatible reservation was, however, important insofar as it might sometimes indicate the objecting party's position on the validity of the reservation itself. Such an objection could put strong pressure on the reserving State to withdraw its reservation or to amend it to bring it into line with the object and purpose of the treaty. Nevertheless, the absence of protest from States parties should not be read as tacit acceptance by them of the incompatible reservation. It ought to be made clear that articles 20 and 21 of the Vienna Convention on the

Law of Treaties did not apply to reservations falling under article 19 (c) of the Convention. In any case, the reserving State could always withdraw or modify an incompatible reservation, or withdraw from the actual treaty if its consent to be bound by that treaty depended on the reservation. That position was supported by recent State practice and regional jurisprudence. Furthermore, in many cases, it had been held that a State entering an incompatible reservation would continue to be bound by the treaty in question without the benefit of the reservation, especially when the treaty concerned human rights or environmental issues, since the aim of the States objecting to the reservation was to preserve the integrity of the treaty for the benefit of persons under the jurisdiction of the reserving State.

40. **Ms. Morariu** (Romania) said that the Special Rapporteur's aim, which her delegation endorsed, of promoting and strengthening the security of legal relations between States by ensuring, where possible, that treaties remained operational in the event of an armed conflict justified the introduction into the draft articles of some provisions that might otherwise have seemed superfluous. Her delegation was thus in favour of retaining draft article 3, which expressly recognized that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties.

41. With regard to draft article 4, her delegation considered that, important as the intention of the parties was, reference might also be made to other criteria, such as the object and purpose of the treaty, express provisions or characteristic features of the conflict in question. Such additional criteria would lend the draft article more flexibility and enable the Commission to focus more effectively on the specific effects of conflicts on treaties.

42. The aim of keeping treaties operational was also ample justification for the detailed provision contained in draft article 6: the presumption of continuation indicated the Special Rapporteur's pragmatic approach to situations that, on the face of it, would involve the suspension of treaty relations. Although the draft article appeared to be simply an application of the principle already stated in draft article 3, and therefore superfluous, the provision bore independent repetition in order to do away with any risk of presuming that a treaty that had given rise to an armed conflict was null and void.

43. Her delegation endorsed, up to a point, the inclusion of the list of categories of treaty in draft article 7, paragraph 2, so long as the list was purely indicative. Although it would be difficult to strike the right balance as to which categories to include or omit, the list would have its uses, so long as it did not claim to be exhaustive.

44. Lastly, her delegation had some reservations about draft article 10. The text should be reviewed, as the Special Rapporteur had himself acknowledged.

45. **Mr. Spacek** (Slovakia) said his Government basically supported the approach adopted by the Special Rapporteur for the topic "Effects of armed conflicts on treaties" (A/CN.4/552). He had been right to produce an entire set of draft articles providing an overall view of the topic and all the issues it raised. The definition of "armed conflict" should be handled with the utmost care. It should not a priori exclude internal armed conflicts, but should cover most of the situations in which armed violence was likely to affect the operation of treaties or interrupt treaty relations between States. Perhaps no definition of the term "armed conflict" should be provided, but if one were to be established, that given in the *Tadić* case ought to be borne in mind (A/60/10, para. 140).

46. On the other hand, the Special Rapporteur's limitation of the scope of the draft articles to treaties among States seemed too narrow; it should be widened to encompass treaties to which international organizations were also parties. The general principle that treaties continued in operation after the outbreak of an armed conflict was acceptable. A pragmatic approach should be taken in that respect. The draft articles belonged not so much to the law on armed conflicts as to the law of treaties. In fact, they would complement the Vienna Convention on the Law of Treaties in a field that had originally been excluded from it. Articles 11 to 14 did not pose any special difficulties.

47. His Government was generally satisfied with the set of 19 draft articles on diplomatic protection adopted on first reading by the Commission but intended to submit written comments as requested. It was to be hoped that upon receiving comments from Governments the Commission would be in a position to complete its work on the topic for presentation to the General Assembly at its sixty-first session. His delegation shared the view of the Special Rapporteur

that the clean hands doctrine should not be included in the draft articles, since it had been shown that the doctrine had chiefly been raised in claims between States for direct injury.

48. With regard to the topic "Fragmentation of international law", his delegation fully supported the Commission's methodology and found the topics of the various studies to be interesting and useful and likely to make a significant contribution in both theoretical and practical terms. It was pleased that the Study Group intended to present the final outcome of its work by the end of the current quinquennium.

49. **Mr. Sheeran** (New Zealand) said that, although the codification exercise on diplomatic protection was essentially a residual one, given the wide range of relevant treaties, especially on human rights and bilateral investment, diplomatic protection remained a useful tool, since there were few effective procedural remedies available in international law to individuals or corporations injured by a foreign State. In some areas the Special Rapporteur's proposals had gone further in the progressive development of international law than the Commission as a whole was prepared to accept. In some cases New Zealand had preferred the initial proposals, but it felt that the draft articles as adopted on first reading were a sound product with a reasonable mix of codification and sensible progressive development.

50. In particular, his delegation acknowledged the wisdom of a number of important legal points incorporated in the draft articles, including: not requiring proof of the so-called "genuine link" between the injured individual and the claimant's State of nationality; incorporating a significant exception to the continuous nationality rule; framing the rules relating to the diplomatic protection of dual nationals in a way that enhanced their prospects of obtaining appropriate protection; recognizing a limited exception to the *Barcelona Traction* rule on the nationality of corporations to permit protection of shareholders by their State of nationality in certain circumstances; broadening the exception to the exhaustion of local remedies rule; providing for the extension of diplomatic protection to refugees and stateless persons; and recognizing the right of both the State of nationality and the flag State to seek redress for injury suffered by ships' crews.

51. His delegation continued to support the Commission's very useful work on the topic "Fragmentation of international law", which would undoubtedly contribute to a wider understanding of the overall coherence of the international legal system. It might prove to be a good example of the kind of useful work of a non-traditional type that could be included in future work programmes. His delegation agreed that the outcome should be of practical value and was pleased that the Commission had kept that goal firmly in mind. In procedural terms, New Zealand strongly supported the plan for a two-part outcome, comprising a practice-oriented set of brief statements complemented by an analytical study synthesizing the various individual studies undertaken by members of the Study Group, which would serve as a sort of commentary. Since the topic was so strongly linked to the Commission's current membership, his delegation urged the completion of the full two-part outcome by the end of the quinquennium.

52. The topic "International liability in case of loss from transboundary harm arising out of hazardous activities", had been omitted from the agenda of the Commission's fifty-seventh session because the Commission was awaiting comments from Governments on the draft principles on the allocation of loss adopted on first reading. New Zealand believed that the risk of transboundary harm from hazardous activities was an issue that could only grow in importance with the advent of new technologies. Prevention was certainly one key to the issue, but the question of who should bear the loss in circumstances where loss occurred despite the application of the best known prevention measures could not be ignored. The draft principles, which were general and residual in nature, struck a fair balance between the rights and obligations of the operator and the victim of the harm and would help to fill a significant gap in the international legal order. It was to be hoped that the work on the topic could be concluded in 2006.

53. *Mr. Yañez-Barnuevo (Spain) took the chair.*

Agenda item 158: Observer status for the Hague Conference on Private International Law in the General Assembly (*continued*) (A/60/232; A/C.6/60/L.9)

54. **The Chairman** drew attention to draft resolution A/C.6/60/L.9 and noted several editorial corrections.

55. **Ms. Schwachöfer** (Netherlands) announced that China, Cyprus, Greece, Hungary, Latvia, Luxembourg, New Zealand, Portugal, Romania, Serbia and Montenegro and Sweden had joined the sponsors of the draft resolution.

56. *Draft resolution A/C.6/60/L.9 was adopted.*

Agenda item 159: Observer status for the Ibero-American Conference in the General Assembly (A/60/233; A/C.6/60/L.10)

57. **Mr. de Palacio España** (Spain), introducing draft resolution A/C.6/60/L.10, said that the Ibero-American Conference had been established in 1991 by the first Ibero-American Summit of Heads of State and Government with the participation of the sovereign Portuguese- and Spanish-speaking States of the Americas and Europe. The Summit of Heads of State and Government was the highest forum of the Conference, which was served by the Ibero-American Secretariat with headquarters in Madrid.

58. The Ibero-American Conference conducted a wide range of cooperation programmes, such as the fund for the development of indigenous peoples, the scientific and technology development programme and the post-graduate exchange programme. The many sectoral meetings of ministers which it organized addressed economic, financial and social issues, from migration and social security to promoting investment and alleviating external debt. The Conference's chief forum, the Summit of Heads of State and Government, had affirmed that democracy and respect for human rights and fundamental freedoms were the pillars of the Ibero-American community of nations and had reiterated their commitment to the purposes and principles established in the Charter of the United Nations. There was a broad spectrum of issues in which the Ibero-American Conference and the United Nations could work together, and the granting of observer status would help to strengthen their collaboration.

59. **Mr. Díaz Paniagua** (Costa Rica) said that the Ibero-American Conference was a valuable mechanism for coordination and cooperation among the nations of Latin America and the Iberian peninsula. His delegation noted with satisfaction the recent start-up of the Ibero-American Secretariat and the appointment of its first Secretary-General and therefore strongly supported the draft resolution to grant observer status to the Conference.

Agenda item 78: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (A/60/441; A/C.6/60/L.5)

60. **Mr. Tachie-Menson** (Ghana), speaking as Chairman of the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, introduced the report of the Secretary-General on the Programme (A/60/441) and draft resolution A/C.6/60/L.5. He noted that the report covered the Programme activities for the biennium 2004-2005 and included the guidelines and recommendations regarding the execution of the Programme for the biennium 2006-2007. The Programme encompassed a variety of practical, hands-on activities benefiting both individuals and institutions, including fellowships for the study of international law, regional courses on law and international trade law seminars and symposiums organized in developing countries.

61. In view of the ever-growing importance of international law, there was an urgent need for concerted efforts to encourage its teaching and dissemination, particularly in the developing world, where there was a lack of resources but certainly not of talent. Although much was being done with a zero-growth budget, much more could be accomplished with larger contributions from Member States and their institutions. On behalf of the Advisory Committee he wished to thank the countries that had made contributions, which were mentioned in section IV of the report.

62. Draft resolution A/C.6/60/L.5 generally followed the pattern of previous resolutions on the topic. Among other things, it approved the guidelines and recommendations contained in section III of the report of the Secretary-General and adopted by the Advisory Committee, authorized the Secretary-General to carry out the activities specified in his report in 2006 and 2007 and to finance them from the regular budget as well as from voluntary contributions, and solicited such contributions from Member States and interested organizations and individuals.

The meeting rose at 11.35 a.m.